Supreme Court, U.S.
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No. 99-1733

In The

Supreme Court of the United States

SHOPPERS FOOD WAREHOUSE MD CORP.,

Petitioner,

vs.

ASUNCION MORENO,

Respondent.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Asuncion Moreno respectfully opposes Shoppers Food Warehouse's Petition for a Writ of Certiorari (the "Petition"). Shoppers Food Warehouse has not set forth compelling reasons for this Court to grant the Petition. Specifically, (a) there is no important federal question which was decided in the *en banc* decision and which conflicts with decisions of another state court of last resort or of a United States court of appeals; and (b) the *en banc* decision did not address an important question of federal law that has not been settled by this Court. To the contrary, the issues raised by Shoppers Food Warehouse have been addressed, examined, and decided by this Court on numerous prior occasions. For these reasons the Petition should be denied.

SHOPPERS FOOD WAREHOUSE MISSTATES FACTS IN ITS STATEMENT OF THE CASE

Shoppers Food Warehouse misstates facts in its Statement of the Case and throughout the Petition by repeatedly suggesting that it had exceedingly minimum contacts with the District of Columbia. By skirting the hard facts about its conduct, Shoppers Food Warehouse attempts to create an issue that would be appropriate for resolution by this Court; put simply it attempts to phrase the issue as whether jurisdiction should lie where the "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.))

The true facts paint a very different picture, and can be summarized as follows:

1. Shoppers Food Warehouse extensively advertised in The Washington Post from October 6, 1993 through December 1, 1993, which includes the date on which Ms. Moreno slipped and fell in a Shoppers Food Warehouse store. Shoppers Food Warehouse continues to advertise extensively, even today, in The Washington Post.

2. The advertisements in The Washington Post appeared several times per week, and contained the following language in bold: "**SHOPPERS TOTAL WAREHOUSE PRICES EVERYDAY! FEATURE PRICES IN EFFECT 7 FULL DAYS!**" The actual text generally contained a picture of the sale item, a description of the product, and the price. (Pet. App. 17a.)

3. The advertisements contained a further inducement, other than price, for persons to travel to Shoppers Food Warehouse. For example, from October 13, 1993 through November 25, 1993, there was an opportunity to win tickets to a Washington Redskins football game and to meet several Redskins football players. There was also an opportunity for customers to receive a free Thanksgiving turkey or ham. (Pet. App. 17a.)

4. The advertisements contained language in bold indicating "**No Matter Where You Live . . . It's Worth The Drive!**" (Pet. App. 17a.)

5. Shoppers Food Warehouse ran television advertisements which aired in the District of Columbia, and listed its store in the District of Columbia Yellow Pages of the C&P Telephone book during 1993-1994. (Pet. App. 17a.)

6. In its advertisements Shoppers Food Warehouse compared its prices to other stores in Maryland, Virginia, and the District of Columbia. (Pet. App. 17a.)

Additionally, it bears mentioning that Shoppers Food Warehouse wrongly asserts that Ms. Moreno never claimed to see the advertisements before going to Shoppers Food Warehouse. (Pet. at 3.) In fact, at the trial of this matter the trial judge refused to allow testimony one way or the other on this point.

The foundation upon which Shoppers Food Warehouse's argument is built is that certiorari should be granted because its "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.)) The reality is, however, that Shoppers Food Warehouse engaged in a systematic and continuous course of conduct designed to target District of Columbia Residents. Its *only* contacts indeed are *substantial* contacts, as set forth in paragraphs 1 through 6 above. When the issue is viewed in the appropriate factual light, it becomes readily apparent that there is no serious division of authority in the lower courts in terms of whether jurisdiction should be based over a non-resident defendant whose conduct was as substantial as Shoppers Food Warehouse's conduct was in this case. Shoppers Food Warehouse's arguments should respectfully be seen for what they are, namely, a blind attempt to remove the facts from the issue in hopes of persuading this Court to grant certiorari.

REASONS FOR DENYING THE PETITION

I. The Lower Court Decision Is Consistent with this Court's Prior Decisions

The *en banc* decision is consistent with past decisions of this Court, and comports with due process requirements. This Court has considered time and time again cases that dealt with the issue of whether a defendant sufficiently directed its activities at a forum state to subject it to jurisdiction. For more than fifty years this Court has recognized that a defendant who realizes the "benefits" of a forum state must also face "obligations [which] arise out of or are connected with the [defendant's] activities within the [forum] state." *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). This Court further refined the "minimum contacts" analysis thirteen years later in *Hanson v. Denckla*, 357 U.S. 235 (1958), and opined that to assert jurisdiction a defendant must "purposefully avail itself of the privilege of conducting activities within the forum State. . . . " *Id.* at 253. The notion of purposeful availment has been restated by this Court over and over again. In *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), this Court declared that the exercise of personal jurisdiction by the forum state was appropriate where a non-resident defendant "purposefully availed [itself] of the benefits and protections" of the forum state. *Kulko*, 436 U.S. at 94; *Shaffer*, 433 U.S. at 216.

Perhaps this Court most clearly laid the analytical blueprint in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), when it underscored that "[t]he limits imposed on state jurisdiction by the Due Process Clause,

in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." *Id.* at 292. The majority of the *en banc* opinion at the lower court correctly noted that *World-Wide Volkswagen* references the "fundamental transformation in the American economy" and "the economic interdependence of the States." *Id.* at 293. Put simply, the Supreme Court has previously highlighted the two principles governing due process analysis:

> [1] the foreseeability that is critical . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there [and (2) when] a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' . . . it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

Id. at 297 (quoting *Hanson, supra,* 357 U.S. at 253).

The *en banc* decision is consistent with the next series of jurisdiction cases decided by this Court. Three of those decisions are *Keeton v. Hustler Magazine,* 465 U.S. 770 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408 (1984); and *Burger King v. Rudzewicz,* 471 U.S. 462 (1985). The facts in *Keeton* closely resemble the facts of the instant case. There, the issue was whether personal jurisdiction was proper where the only connection between the non-resident defendant and the forum state was the monthly sale of the non-resident defendant's magazine.

This Court commented, "Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine." *Id.* at 781.

This Court fully addressed the distinction between general and specific jurisdiction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), and shortly thereafter further elaborated on this point in *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). Essentially, this Court in *Burger King* reiterated three important points: (1) there are no appropriate "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, but rather the facts of each case must be weighed to determine whether they comport with "fair play and substantial justice"; (2) non-resident defendants who purposefully direct activities towards residents of a forum state are warned about the possibility of being haled to court in the forum state; and (3) jurisdiction is proper where there is a "substantial connection" with the forum state.

II. The Assertion of Jurisdiction over Shoppers Food Warehouse Comports with Due Process

When viewing the conduct of Shoppers Food Warehouse through an accurate lens, it becomes clear that the assertion of jurisdiction by the District of Columbia comports with all notions of due process, and presents no new issues before this Court. Shoppers Food Warehouse does not dispute that it systematically targeted District of

Columbia residents through its advertising. The advertisements featured inducements for shoppers to come to its stores, including opportunities to win tickets to a Washington Redskins football game, or to meet the players. Most important, however, is the bold declaration in the advertisements that "No matter where you live . . . it's worth the drive." (Pet. App. 17a.)

These advertisements create such a systematic pattern of eliciting a specific consumer response that it makes the assertion of jurisdiction constitutional. The advertisements are not random, fortuitous, accidental, or attenuated. *See Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984). In addition to airing television advertisements in the District of Columbia, Shoppers Food Warehouse placed large, illustrated advertisements in The Washington Post, which is the largest newspaper in the District of Columbia. Further, Shoppers Food Warehouse placed advertisements in the District of Columbia Yellow Pages of the C&P Telephone book. The purpose of this marketing plan remains clear – to solicit customers from the District of Columbia to its stores "with the expectation" that the District of Columbia residents would purchase products sold in those stores. *See Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985). It follows, then, that Shoppers Food Warehouse certainly purposefully availed itself of the privilege of conducting activities within the District of Columbia, and should reasonably have anticipated being haled into court here. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Shoppers Food Warehouse implies that certiorari should be granted because the facts before the Court present a new twist on whether due process has been

met, insofar as it was not put on notice that it could be sued by a District of Columbia resident in the District of Columbia. This position is at odds with the factual reality of retail sales. To this end, the *en banc* majority correctly opined that Shoppers Food Warehouse had "fair warning" that it could be sued by a District of Columbia resident who slipped and fell in one of its stores. (Pet. App. 20a.) The logic is clear, and presents no new twist on due process:

(a) Shoppers Food Warehouse engaged in systematic and continuous advertising in the District of Columbia;

(b) Its stores are located just minutes from the border of the District of Columbia;

(c) As a grocery retailer, it reasonably should have anticipated that its customers – whether from the District of Columbia, Maryland, or Virginia – would be subject to the same hazards as other customers including a slip and fall incident.

The majority in the *en banc* opinion further highlights the important compounding fact that the Metropolitan Washington D.C. area functions as a "unified legal and commercial community." (*Id.* at 21a.)

Shoppers Food Warehouse also argues that the facts of this case are ripe for review because there is no nexus between its activities and Ms. Moreno's claim. This Court has long held that the claim must "result[ ] from alleged injuries that 'arise out of *or relate to' those activities.*" *Burger King, supra,* 471 U.S. at 472 (quoting *Helicopteros, supra,* 466 U.S. at 414) (emphasis added.) While it is true

(as discussed more fully below) that different jurisdictions have handled the nexus requirement differently, Shoppers Food Warehouse is confused insofar as it contends that this creates an appropriate issue for review by this Court. To the contrary, different jurisdictions may develop different law on this issue of the nexus requirement, so long as due process is met; indeed, this Court has admonished that there be no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction. *Burger King v. Rudzewicz*, 471 U.S. 462 (1985). The *en banc* majority summarized this argument clearly:

> Where Shoppers has deliberately and directly solicited District residents to become customers in its Maryland and Virginia stores, there can be no doubt that its advertising relates to or has a discernible relationship to a claim by a District resident who becomes a customer in one of Shoppers' stores and is injured. This is true because it is reasonably foreseeable that, as a result of advertising extensively and over a substantial period of time in the District's major circulation newspaper, Shoppers could be sued in the District on a claim similar to that filed by Ms. Moreno. The trial court found that Shoppers "owns numerous stores in Maryland and Virginia, several of which are located within a few miles of the District of Columbia border." The trial court also determined that Shoppers "contracts with and advertises in [T]he Washington Post [and the Yellow Pages], thereby targeting and soliciting customers in the District of Columbia area."

(Pet. App. 28a-29a) (citations omitted). Thus, the assertion of jurisdiction by the District of Columbia comports with due process.

III. Shoppers Food Warehouse Mischaracterizes the Issue as a "Deep Division of Authority"; Simply Because Lower Courts Apply Different Tests Does Not Mean There Is a Division of Authority

Shoppers Food Warehouse erroneously contends that this case presents an opportunity to resolve what it perceives as a "conspicuously open question" in personal jurisdiction cases. (Pet. App. 21.) The argument follows from Shoppers Food Warehouse that this is an important issue because it "arises whenever a nonresident company advertises in one forum and an injury occurs in another." (*Id.* at 18.) Specifically referenced are the travel industry and ski resorts. (*Id.*) Again, Shoppers Food Warehouse refuses to accurately describe the issue before the Court, and merely phrases it as whether jurisdiction should lie where the "*only* forum contacts consist of advertising in a metropolitan newspaper. . . . " (Pet. at 3 (emphasis added.)) In reality the issue – of which there is no division of authority – is whether jurisdiction is proper where a non-resident defendant engages in a systematic and continuous pattern of advertising designed to elicit a predictable consumer response. Shoppers Food Warehouse seems to be skirting its actual contacts with the District of Columbia, including (a) that it extensively advertised in The Washington Post from October 6, 1993 through December 1, 1993, which includes the date on which Ms. Moreno slipped and fell; (b) that the advertisements in The Washington Post appeared several times

weekly, and contained the language in bold "**SHOPPERS TOTAL WAREHOUSE PRICES EVERYDAY! FEATURE PRICES IN EFFECT 7 FULL DAYS!**"; (c) that the advertisements contained a further inducement, other than price, for persons to travel to Shoppers Food Warehouse, including an opportunity to win tickets to a Washington Redskins football game and to meet several Redskins football players; (d) that there was text indicating "**No Matter Where You Live . . . It's Worth The Drive!**" (Pet. App. 17a); and (f) that Shoppers Food Warehouse also ran television advertisements which aired in the District of Columbia, and listed its store in the District of Columbia Yellow Pages of the C&P Telephone book during 1993-1994. (Pet. App. 17a.)

Shoppers Food Warehouse misses the point entirely on the issue of whether there is an important division of authority among the lower courts. Just because different courts at the state and federal level develop different common law on an issue does not mean there is a split of authority. In fact, the role of this Court is to establish the framework within which lower state and federal courts can apply the law as differing factual situations arise. Shoppers Food Warehouse attempts to create a non-existent split, when in reality the split represents nothing more than the application of the law of this Court to different factual circumstances. The issue is not whether there are differing schools of thought on the proper use of the "proximate cause" test, the "related to" test, or the "but for" test; rather, the issue is if the assertion of jurisdiction – whether based on the "proximate cause" test or the "but for" test or the "related to" test – is

constitutional. For good reason this Court has never without regard to underlying facts simply opined which test should be used. Instead, this Court on several occasions has examined the necessary "arising from" requirement, and established the landscape for application of the law.

This Court has on at least three prior occasions examined the same issues which are at the heart of the Petition, and, for that reason, the Court need not again address the issues. Specifically, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), this Court explored the same issues currently before it, namely whether jurisdiction is appropriate under either the "arising out of" or "related to" tests. In fact, in *Helicopteros* this Court delineated the requirements of specific jurisdiction of a claim as merely being either "related to" or "arising out of" the connection with the forum state. *Id.* at 415 n.10. Justice Brennan in his dissenting opinion supported the same test applied by the *en banc* majority when he commented that "[l]imiting the specific jurisdiction of a forum to cases in which the cause of action formally arose out of the defendant's contacts with the State would subject constitutional safeguards to the vagaries of the substantive law or pleading requirements of each State." *Id.*

The Court again looked at this same issue just one year later in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (U.S. 1985). There is no split of authority simply because different jurisdictions have adopted different tests; lower courts can develop different common law as different factual situations arise, so long as the assertion of jurisdiction comports with due process as delineated

by this Court. This Court squarely addressed this argument in *Burger King* when it specifically rejected the implementation of any "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction. *Id.* at 478; *International Shoe Co. v. Washington,* 326 U.S. at 320. Indeed, this Court completely and fully explored "why a forum legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' his activities toward forum residents." *Burger* King, *id.* 471 U.S. at 473.[1]

Perhaps it was the *en banc* majority who most clearly articulated its review of different authority when it commented as follows:

> Based upon our review of nexus tests used in other jurisdictions, the criticisms leveled at some of them, and the Supreme Court's admonition that there are no "mechanical tests" or "talismanic formulas" for the determination of personal jurisdiction, we see no reason to deviate from – and thus we reaffirm – our past decisions which have interpreted the "arise from" language of [the long arm statute] flexibly and synonymously with "relate to" or having a "substantial connection with," in the same way

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[1] It is worth noting that this Court previously refused to grant certiorari on this issue which came on appeal from *Shute v. Carnival Cruise Lines,* 897 F.2d 377 (9th Cir. 1988). The issue presented on petition for certiorari was whether jurisdiction was properly asserted over a non-resident defendant where the only contact to the State of Washington was advertising in Washington newspapers – the same issue currently before the Court.

> that the Supreme Court's due process analysis has used these terms interchangeably.

(Pet. App. 28a.) In short, there is no division of authority such that this Court should grant certiorari. The *en banc* opinion is consistent with this Court's prior rulings, and the Court has on numerous occasions previously addressed the issues raised in the Petition.

CONCLUSION

For the reasons discussed herein, the Petition should be denied.

Respectfully submitted,

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